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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 922

KARL F. KNETSCH AND EVA FAY KNETSCH, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

KARL F. KNETSCH AND EVA FAY KNETSCH, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (Appendix A, *infra*, pp. 1a-16a) is reported at 348 F. 2d 932.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1965 (App. A, *infra,* p. 16a), and Petitioners' motion for rehearing was denied on October 15, 1965. (R. 329-330).* Also, on October 15, 1965 the Court of Claims entered an order denying Petitioners' motion to file an amended petition (R. 223). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

Whether an unjustified outright refusal of a trial court to grant a plaintiff's motion for leave to file an amended petition constitutes an abuse of discretion.

Whether a motion for summary judgment may be granted for a defendant while a motion to amend plaintiff's petition is pending.

Whether summary judgment is appropriate where ultimate facts respecting motive or intent must be made.

Whether a trial court, on a motion for summary judgment, may draw inferences as to plaintiffs' purposes of intentions.

Whether genuine issues of material fact were present which precluded the granting of summary judgment.

Whether the Government was entitled to summary judgment as a matter of law.

STATUTES AND RULES INVOLVED

The pertinent portions of the Internal Revenue Code of 1954 and the Rules of the Court of Claims are set forth in Appendix B, *infra,* pp. 17a-18a.

* By order dated January 13, 1966, the Chief Justice extended the time for filing a Petition for a Writ of Certiorari to and including January 17, 1966.

STATEMENT

The Court of Claims granted the Government's motion for summary judgment and dismissed the Knetsch petition. (R. 312). In its motion the Government stated: "Solely for purposes of this motion the allegations of well-pleaded facts in taxpayers' petition are taken as true". (R. 18). Thus, it conceded as true paragraph 22 of the Petition which states:

> "On January 18, 1957, the Commissioner of Internal Revenue stated to the United States House of Representatives' Subcommittee on Internal Revenue Taxation, in formal hearings before that Subcommittee, that, while interest deductions claimed in regard to annuity transactions were being denied taxpayers who claimed same, the Internal Revenue Service was, *as a matter of policy, allowing* such taxpayers a deduction for their net out-of-pocket *loss* realized from such annuity transactions where the taxpayer had acted in reliance on references in trade magazines and the tax services to the issuance of private rulings by the Treasury Department stating that interest paid in connection with such annuity transactions was deductible for income tax purposes."[1]

The Government, in like manner, also conceded that Petitioner Karl F. Knetsch had purchased ten (10) annuity contracts while relying upon publicized private rulings of the Internal Revenue Service which held that the interest paid in connection with the purchase of such annuities was deductible,[2] and that the interest deductions claimed by Petitioners with regard to such

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[1] Petition, pgh. 22, R. 7. (Emphasis supplied).

[2] Petition, pghs. 4-6, R. 2-3. The Government verified said allegations before it filed its motion for summary judgment by taking the deposition of Petitioner Karl F. Knetsch.

annuity transactions had been denied them,[3] and that the Petitioners had terminated the said annuity transactions in 1956 at which time they realized a net out-of-pocket loss in the amount of $137,315.[4]

Despite the foregoing declaration of policy, the Commissioner of Internal Revenue denied the $137,315 net out-of-pocket loss claimed by Petitioners on their 1956 federal income tax return filed on or about April 15, 1957.[5] Petitioners thereupon paid the resulting assessment of $86,508.92 plus interest of $19,301.87, and then filed a timely claim for refund.[6] After disallowance of such claim for refund, Petitioners sued for the refund of the said sum of $105,810.79 in the Court of Claims.[7]

Subsequently, the Government filed its motion for summary judgment. (R. 18). Petitioners then filed a cross-motion for summary judgment. (R. 107). While these motions were pending, and more than a month prior to the hearing on both motions for summary judgment, Petitioners, on March 5, 1965, filed a motion for leave to file an amended petition and a copy of said amended petition. (R. 223-234). Although the Government had filed no opposition to the said motion to amend the petition, the Court of Claims, on March 10, 1965, entered an order stating that action on the motion for leave to file an amended petition was deferred pending the Court's action on the motions for summary judgment!

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[3] Petition, pghs. 7-18, R. 3-5.

[4] Petition, pghs. 19-21, R. 6-7.

[5] Petition, pgh. 23, R. 7.

[6] Petition, pghs. 27-30, R. 8-9.

[7] Petition, pghs. 30-34, R. 9-10.

Later on July 16, 1965, the Court of Claims granted the Government's motion for summary judgment without having ruled on Petitioners' motion for leave to file an amended petition. Thereafter, on October 16, 1965, the Court of Claims entered an order denying Petitioners' motion for leave to file an amended petition. No reasons for said denial were given, and no hearing was held thereon.

One of the major issues raised in this petition, and set forth in Point VI under Reasons For Granting The Writ, is also the subject of a Petition for Writ of Certiorari filed on December 13, 1965, by the Solicitor General in *United States* v. *International Business Machines Corporation,* No. 820, October Term, 1965.

REASONS FOR GRANTING THE WRIT

The reasons why a writ of certiorari should be granted are as follows:

I

The Unjustified Outright Refusal of the Court of Claims to Grant Leave to Petitioners to File an Amended Petition Constitutes an Abuse of Discretion Which Can Only Be Corrected Here

On March 5, 1965, when Petitioners moved the Court of Claims to enter an order granting them leave to file an amended petition setting forth three additional alternative theories for recovery,[8] they asserted that

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[8] One of the three newly asserted theories for recovery was that the Petitioners were entitled to a theft loss under Section 165 (e). (R. 230-232). Thereafter, on March 24, 1965, and before the motion for summary judgment was heard here, the Tax Court, in a case of first impression (opinion by Judge Raum, no dissenters), held that the taxpayers in Perry A. Nichols v. Commissioner, 43

their rights would be impaired if not permitted to file the said amended petition because a ruling in favor of the Government on its then pending motion for summary judgment would foreclose them from thereafter asserting such additional alternative theories as grounds for the recovery of their claimed refund.[9] Nevertheless, and even though the Government had filed no opposition thereto,[10] the Court of Claims deferred action on said motion to amend the petition and proceeded on April 7, 1965 to hear oral argument on the pending motions for summary judgment. On July 16, 1965, the Court of Claims granted the Government's motion for summary judgment and dismissed the petition. Thereafter, but not until October 15, 1965, and without any hearing being noticed or held, the Court of Claims denied Petitioners' motion for leave to file an amended petition. When it did so,

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T.C. 842, who had engaged in one of the now notorious "Livingstone Treasury Note tax avoidance schemes" were entitled to a theft loss deduction for the moneys they paid out to Livingstone in reliance on Livingstone's false representations. The deduction allowed was, of course, equal to the net out-of-pocket expense incurred in the said "sham transaction" therein. The Government's appeal in the Nichols case, supra, was withdrawn on December 8, 1965.

[9] Summary judgment goes to the merits and operates in bar of the cause of action. Martucci v. Mayer, 210 F. 2d 259, 260, and authorities collected therein. See also 6 Moore, Federal Practice § 56.03.

[10] Under the modern view of permitting liberal amendment of pleadings so that cases are ultimately decided on their substantive merits, the burden of proof is upon the party opposing the amendment to show that he would be *prejudiced* thereby. McHenry v. Ford Motor Co., 269 F. 2d 18, 25 (C.A. 6, 1959); Friedman v. Typhoon Air Conditioning Co., Inc., 31 F.R.D. 787 (E.D. N.Y., 1962); 3 Moore, Federal Practice §§ 15.02 [2], 15.08 [2].

it simply entered an order of denial. No reasons for the denial were stated.

However, in *Foman* v. *Davis,* 371 U.S. 178, after acknowledging that the granting or denial of a motion for leave to amend pleadings is, of course, within the discretion of the trial court, this Court held that an outright refusal to grant such leave without any justifying reason appearing for the refusal is an abuse of discretion and inconsistent with the spirit of modern civil practice.[11] Thus, the Court of Claims has abused its discretion, and acted in disregard of the spirit of modern rules of practice permitting liberal amendment of pleadings.

It is true that in the *Foman* case, *supra,* Mr. Justice Harlan and Mr. Justice White filed a separate memorandum in which they stated they believed that matters respecting abuse of discretion by the trial court in refusing to grant leave to amend pleadings should be left with the Court of Appeals. In this case, however, since the only reviewing court to which the Court of Claims is responsible is this Court, unless certiorari is granted here the abuse of discretion will remain uncorrected.

II

The Action of the Court of Claims in Granting a Motion for Summary Judgment While a Motion to Amend the Petition Was Pending Conflicts With Decisions of the Courts of Appeals

On July 16, 1965, while Petitioners' motion for leave to file an amended petition was pending, the Court of Claims granted the Government's motion for summary judgment and dismissed Petitioners' petition. Such

[11] See discussion in 3 Moore, Federal Practice § 15.02 (2) at 815.

conduct conflicts with decisions of the Court of Appeals.

Most recently, the Sixth Circuit, in *Retail Clerks' International Assoc.* v. *Lion Dry Goods,* 341 F. 2d 715, 723 (C.A. 6, 1965), held that ". . . where an amended pleading has been tendered and permission to file it should be given, an adversary motion for summary judgment should not be granted before it is filed and considered . . ." In like fashion, the Ninth Circuit, in *Castner* v. *First National Bank of Anchorage,* 278 F. 2d 376, 384 (C.A. 9, 1960), held that where an amendment of the pleadings is justified, that amendment ought not to be prevented by the entry of a final summary judgment on defendants' motion, and that the trial court had to be reversed for doing so under such circumstances. See further: *Rossiter* v. *Vogel,* 134 F. 2d 908, 912 (C.A. 2, 1943); *Kane* v. *Chrysler Corporation,* 80 F. Supp. 360, 366 (Del., 1948); *Snyder* v. *Dravo Corporation,* 6 F.R.D. 546, 549 (W.D. Pa., 1947); *Hartman* v. *Time,* 64 F. Supp. 671, 680 (E.D. Pa., 1946). See also the views on liberality of amendment expressed by Judge Browning in *Breier* v. *Northern California Bowling Proprietors' Assn.,* 316 F. 2d 791 (C.A. 9, 1963), wherein the Ninth Circuit declined even to speculate as to whether the amended complaints would be legally sufficient although it reversed the trial court for failure to allow plaintiffs leave to file an amended complaint.

III

The Court of Claims Disregarded the Directions of This Court and the Courts of Appeals That Summary Judgment Is Not Appropriate Where Ultimate Facts Respecting Motive Must Be Made

In 1963, for the second time in a short space of time, this Court, in *White Motor Co.* v. *United States,* 372 U.S. 253, 259, admonished: "Summary judgments . . . as we warned in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 . . . are not appropriate 'where motive and intent play leading roles' . . ."

Prior to, and since the *White* and *Poller* decisions, supra, the Courts of Appeals have been sounding the same warning. For example, in *Cross* v. *United States,* 336 F. 2d 431, 433 (C.A. 2, 1964), the Second Circuit stated: ". . . Summary judgment is particularly inappropriate where 'the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.' *Empire Electronics Co.* v. *United States,* 311 F. 2d 175, 180 (2d Cir. 1962); See *Alabama Great So. R.R.* v. *Louisville & Nashville R.R.,* 224 F. 2d 1, 5 (5th Cir. 1955); *Subin* v. *Goldsmith,* 244 F. 2d 753, 758 (2d Cir. 1955) . . ."

Despite the admonitions of this Court, the Court of Claims granted summary judgment for the Government here even though all four of the asserted alternative theories of recovery turn upon ultimate findings

of fact respecting motive and intent.[12] Thus, the Court of Claims deprived Petitioners of their right to put on testimony and introduce evidence with respect to such motive and intent.

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[12] R. 303; Petitioners' claim that they are entitled to a deduction for a loss resulting from a transaction entered into for profit (R. 154-160) is predicated upon an ultimate finding of fact being made that Karl F. Knetsch, at the time he entered into the transaction, did have the profit making motive or purpose required by Section 165 (c) which the Court of Claims acknowledged has always been construed "in terms of the taxpayer's state of mind" (subjective intent).

Petitioners' second, and alternative theory of recovery (R. 160-161) that they were entitled to a deduction for the net out-of-pocket expense paid for the management, conservation or maintenance of property held for the production of income was likewise dependent upon an ultimate finding of fact being made respecting Knetsch's motive or purpose upon entering the transaction.

Petitioners' third, and alternative theory of recovery (R. 125-146) that the refusal of the Commissioner of Internal Revenue to allow them a deduction for their out-of-pocket loss constituted prejudicial discrimination was also based upon an ultimate finding being made respecting what the Commissioner's spokesman, Mr. Harold T. Swartz, intended when he told Congress that taxpayers who had relied on publicized private Internal Revenue Service rulings when they purchased similar annuities were being allowed "a deduction to the extent of the net out-of-pocket expense".

Petitioners' fourth, and alternative theory of recovery also turned on the intent of Mr. Swartz. That theory is that under the doctrine of equitable estoppel (as formulated by the Court of Claims) (R. 147-154), the Commissioner of Internal Revenue should be estopped from repudiating his declaration to Congress that taxpayers like Knetsch were being allowed a deduction for their net out-of-pocket expense.

IV

The Court of Claims Acted in Conflict With the Decisions of the Courts of Appeals by Drawing Fact Inferences as to Purpose and Intention on a Motion for Summary Judgment

In *Gray Tool Co.* v. *Humble Oil & Refining Co.*, 186 F. 2d 365, 367 (C.A. 5, 1951), certiorari denied 341 U.S. 934, the Fifth Circuit said: ". . . A judge may not, on a motion for summary judgment, draw fact inferences as to plaintiff's purposes or intention . . ." This principle has been re-asserted and followed by both the Second and Third Circuits. *Cross* v. *United States*, 336 F. 2d 431, 433 (C.A. 2, 1964); *Bragen* v. *Hudson County News Co.*, 278 F. 2d 615, 618 (C.A. 3, 1960).

Yet acting in disregard of this rule the Court of Claims drew repeated fact inferences respecting purpose and intention. For instance, with regard to Petitioner Knetsch's motive, it stated:

> "In the instant situation, two possible motives or intent *can be ascribed to* these taxpayers when they purchased the annuity contracts. It *appears* that the dominant intent or motive here was the tax advantage sought to be derived from the deductibility of interest. A secondary purpose *would be* that the taxpayers in purchasing these annuity contracts intended to provide for retirement income . . .
>
> We turn now to the question whether *these two types* of 'profit' motives are the profit seeking activities which Section 165(c)(2) requires . . ."[18]

Although the above quotation from the Court of Claims opinion may sound as though it were a theo-

[18] Opinion, App. A, *infra*, pp. 6a-7a. (Emphasis supplied).

retical analysis of a hypothetical case, it is nevertheless the language supporting the judgment in this case which involves present issues and live taxpayers whose subjective state of mind the Court of Claims felt at liberty to draw inferences about on a motion for summary judgment. The Court of Claims made no findings with regard to the Petitioner Knetsch's motives or intent, and indeed could not have done so either as a matter of law[14] or on the state of the record.

In addition the Court of Claims drew fact inferences respecting the intention of Harold T. Swartz who made the statement of Internal Revenue policy to the Congress on which the Petitioners rely. This is shown by the statement of the Court of Claims that:

> "If a policy or practice may be *inferred* from the testimony from the testimony of Mr. Swartz, it seems clear that taxpayers do not fit within such policy and a denial of their claim does not constitute unlawful and prejudicial discrimination."[15] (Emphasis supplied)

The Court of Claims then proceeded to draw an inference respecting what Mr. Swartz intended and on the strength of *that* factual inference, ruled that the factual basis of Petitioners' prejudicial discrimination

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[14] ". . . The duty of the court on such a motion is not to resolve genuine issues of fact, but to determine if such issues are present . . ." Garcia v. United States, 108 F. Supp. 608, 613 (Ct. Cls., 1952).

[15] Opinion, App. A, infra, p. 15a.

contention had not been proved[16] and granted the Government's motion for summary judgment. The drawing of such inferences not only conflicts with the decisions of the Courts of Appeals set forth above, but it is a deprivation of procedural due process to Petitioners in view of the Court of Claims' earlier ruling prohibiting them from taking the deposition of Mr. Swartz so that they would have an opportunity to produce testimony or other evidence respecting what Mr. Swartz intended.[17] Here the Court of Claims not only drew inferences regarding Mr. Swartz' statement. In effect it testified for Mr. Swartz without affording any opportunity for cross-examination to the Peti-

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[16] The Government has conceded that the Court of Claims' ruling granting its motion for summary judgment was founded on a fact determination. See footnote 8 of Petition for Writ of Certiorari filed on December 13, 1965, by the Solicitor General in United States v. International Business Machines Corporation, No. 820, October Term, 1965 which states:

"In Knetsch v. United States, 348 F. 2d 932 (Ct. Cl.) taxpayers who had not requested rulings argued that the Court of Claims' 'doctrine of equality of treatment' required the Commissioner to give them a refund because it had given refunds to other similarly situated taxpayers. Although the court stated that its IBM decision 'was based on the court's evaluation of the particular circumstances in that case' (p. 940, fn. 14), it denied the taxpayers' claims *on the ground* that the treatment they sought had not *in fact* been afforded other taxpayers (p. 940). The court *declined to decide* whether, if the taxpayers had been treated unequally, it would have applied the IBM rationale despite the fact that neither the taxpayers in question nor the taxpayers who had allegedly received more favorable treatment had requested or obtained rulings." (Emphasis supplied)

[17] Depositions in the Court of Claims may be taken only upon leave of the court. Rule 30, Rules of the U.S. Court of Claims (Revised April 1, 1964).

tioners. In *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 628, this Court said:

> ". . . It may well be that the weight of the evidence would be found on a trial to be with defendant. *But it may not withdraw those witnesses from cross-examination,* the best method yet devised for testing untrustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined after trial, in the regular manner . . ." (Emphasis supplied)

In short, it is a denial of due process for the Court of Claims to prohibit Petitioners from taking the deposition of Mr. Swartz, and then ruling against them on a motion for summary judgment on the basis of an assumption or inference as to what he might have testified had he been subjected to cross-examination under oath.[18] That is no different than telling a Negro citizen that he cannot go to a decent school, but must prove his ability to read and write well in order to vote.

Furthermore, even if this case were one where motive and intention were not involved, and the basic evidentiary facts were undisputed so that the Court of Claims could draw inferences for the purpose of finding ultimate facts, this Court would still condemn the action of the Court of Claims. In *United States* v. *Diebold,* 369 U.S. 654, 655, the rule is stated that

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[18] The Third Circuit has not only made the observation that "courts should not for the purpose of expeditious disposition of motions for summary judgments 'shortcut' such (trial) proceedings by 'assuming' factual situations . . .", but has also concluded that "short-cuts" via judicial 'assumptions' provide too many pitfalls to countenance sanction." Krieger v. Ownership Corporation, 270 F. 2d 265, 270 (C.A. 3, 1959).

viewing the facts in the light most favorable to the party opposing the motion, if "inferences contrary to those drawn by the trial court might be permissible," a genuine issue of ultimate fact is thus raised and it is improper for the trial court to grant a motion for summary judgment. That is, even if there were no dispute as to the evidentiary facts herein, if reasonable minds could, nevertheless, draw opposing inferences as to the motive or intention of Petitioner Karl F. Knetsch and Mr. Swartz, the case is not one for disposition by summary judgment, but for trial and findings. *United States* v. *Dollar,* 196 F. 2d 551, 552 (C.A. 9, 1952).

V

The Court of Claims Acted in Conflict With the Decisions of This Court and With Those of the Courts of Appeals By Granting Summary Judgment Herein Where There Exist Genuine Issues of Material Fact

Summary judgment can only be granted "where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial . . ." *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 472-473; *Sartor* v. *Arkansas Gas Corp.,* 321 U.S. 620, 627.[19] "The burden of showing the absence of a genuine issue of material fact which would justify granting summary judgment is upon the party asking for summary judgment . . ." *Assets Service Corporation* v. *United States,* 121 Ct. Cls. 308, 312 (1952); *Joseph Horne*

[19] Rule 64 (d) of the Rules of the Court of Claims pertaining to summary judgment provides: ". . . The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . ."

Co. v. *United States,* 135 F. Supp. 549, 551 (Ct. Cls., 1955). In its Answer (R. 11-14) the Government denied virtually all of the factual allegations contained in the Petition (R. 1-10), and thus raised genuine issues of material fact. When it later made its motion for summary judgment, the Government attempted to carry its burden of showing that there was no genuine issue of material fact by simply stating therein that: "Solely for purposes of this motion the allegations of well-pleaded facts are taken as true."[20] But that statement does not meet the burden which was placed on the Government. Nor does it resolve or eliminate the issues of material fact raised by the pleadings. It is only where there are actually no remaining genuine issues of material fact that summary judgment can be granted. And it is implicit in the Government's statement that "Solely for purposes of this motion the allegations of well-pleaded facts are taken as true" that there are genuine issues of material fact present. Otherwise, there would have been no need for the Government to attach such a qualification to its motion.

Also, the presence of genuine issues of material fact in this case is clearly reflected by the opinion of the Court of Claims. First, there is no statement in the thirteen page opinion granting the Government summary judgment that "there is no genuine issue of material fact." The absence of such a finding or recital is significant in determining whether the Court of

[20] If condoned, such a practice by Government trial lawyers would, no doubt, soon become even more popular because they have everything to gain and nothing to lose. If summary judgment is granted, they have a judgment on the merits. If summary judgment is denied, they have admitted nothing and can still force the plaintiff to his proof.

Claims should have granted the Government's motion for summary judgment. *United States* v. *Western Electric Co.*, 337 F. 2d 568, 572 (C.A. 9, 1964). Second, the repeated drawing of factual inferences by the Court of Claims, as shown in Point IV, *supra*, shows the presence of unresolved factual disputes. If there had been no dispute as to such facts, the Court of Claims would not have had to draw inferences. Instead it would merely have stated the undisputed fact, and applied the law thereto.

Furthermore, and as shown in Point IV, even if there were no dispute here as to the underlying evidentiary facts and it would have otherwise been proper for the Court of Claims to draw inferences therefrom, if viewing such underlying evidentiary facts in the light most favorable to the party opposing the motion, "inferences contrary to those drawn by the trial court might be permissible", then summary judgment may not be granted. *United States* v. *Diebold*, 396 U.S. 654, 655.

VI

The Government Was Not Entitled to Summary Judgment as a Matter of Law in View of the Decisions of This Court and the Court of Claims

In its motion for summary judgment, the Government conceded that:

> "On January 18, 1957, the Commissioner of Internal Revenue stated to the United States House of Representatives' Subcommittee on Internal Revenue Taxation, in formal hearings before that Subcommittee, that, while interest deductions claimed in regard to annuity transactions were being denied taxpayers who claimed same, the Internal Revenue Service, was, as a matter of

> policy, allowing such taxpayers a deduction for their net out-of-pocket *loss* realized from such annuity transactions where the taxpayer had acted in reliance on references in trade magazines and the tax services to the issuance of private rulings by the Treasury Department stating that interest paid in connection with such annuity transactions was deductible for income tax purposes." (R. 7, 18).

The Government, in like fashion, also conceded that Petitioner Karl F. Knetsch had purchased annuity contracts while acting in reliance upon such publicized private Treasury rulings stating that interest paid in connection with such annuity transactions was deductible for income tax purposes, that he had been denied interest deductions claimed with regard thereto, and that he had realized a net out-of-pocket loss from such annuity transaction in the amount of $137,315. (R. 2-9).

As a matter of law, upon such conceded facts, the Petitioners were entitled to recover under the principle that *taxpayers similarly situated should be accorded equal treatment. Dixon* v. *United States,* 381 U.S. 68, 77; *United States* v. *Kaiser,* 363 U.S. 299, 308 (concurring opinion). See also *International Business Machines Corp.* v. *United States,* 343 F. 2d 914 (Ct. Cls., 1965) (Petition for Writ of Certiorari filed by Solicitor General on December 13, 1965, No. 820, October Term, 1965); *Exchange Parts Co. of Fort Worth* v. *United States,* 150 Ct. Cl. 538, 279 F. 2d 251 (Ct. Cls., 1960), cert. not requested by the Government, 1961 P-H Excise & Tax Serv. 195, 314; *City Loan & Savings Co.* v. *United States,* 177 F. Supp. 843 (D.C. Ohio, 1959), aff'd 287 F. 2d 612 (C.A. 6th Cir.);

Brecklein v. *Bookwalter,* 231 F. Supp. 404, 411 (D.C. Mo., 1964) (on appeal to C.A. 8th Cir.); *Connecticut Railway & Lighting Co.* v. *United States,* 135 Ct. Cl. 650, 654, 142 F. Supp. 907, 909 (Ct. Cls., 1956).

Thus, for the Court of Claims to conclude, in the face of such facts conceded by the Government, that the Petitioners were not entitled to relief constitutes a refusal to follow the above decisions of this Court, and a refusal to apply its own decisions to the Petitoners as it did to International Business Machines Corporation on April 16, 1965, three months before the decision herein.

Also, on the basis of such conceded facts, the Petitioners were entitled, as a matter of law, to relief under the doctrine of equitable estoppel as announced by the Court of Claims. That doctrine is one which has been repeatedly invoked "to prevent a wrong being done 'wherever, in good conscience and honest dealing', a party ought not to be permitted to repudiate his previous statements and declarations." *Mahoning Inv. Co.* v. *United States,* 78 Ct. Cl. 231, 248, 3 F. Supp. 622, 630 (1930), cert. denied 291 U.S. 675 (1934) is the leading case.[21] This doctrine of *equitable* estoppel must be distinquished from the ordinary doctrine of estoppel because, as the Court of Claims held in *Branch Banking & Trust Co., et al.* v. *United States,* 120 Ct. Cl. 72, 91-92, 98 F. Supp. 757, 768 (1951), detrimental reliance is not an essential ingredient of equitable estoppel. Here an application of the doctrine of equitable estoppel requires a conclusion that the refusal of the Commissioner of Internal Revenue to allow Peti-

[21] A long line of Court of Claims' cases dealing with this doctrine are collected at R. 147-152.

tioners a deduction for the net out-of-pocket loss suffered by them in the circumstances of this case[22] is an unjustifiable repudiation of his previous statements and declarations to Congress which in good conscience ought not to be permitted.

Third, in the course of reaching the conclusion that, as a matter of law, the Petitioners were not entitled to a loss deduction under Section 165(c)(2) of the Internal Revenue Code of 1954,[23] the Court of Claims not only failed to apply the well-established rule that the statutory requisite of profit-making motive or intention is construed in terms of the taxpayer's state of mind[24] (although it acknowledged the existence of such a rule),[25] but it went on to fashion and apply a new rule of law—namely, that the taxpayer's profit intention is to be determined from *objective* factors. This newly-formulated test is in direct conflict with

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[22] The Commissioner of Internal Revenue not only issued rulings which held that interest paid in connection with such annuity transactions was deductible (which rulings the Treasury admitted to the Congress it knew had been publicized), on the strength of which Petitioner Karl F. Knetsch purchased his annuities, but the Commissioner thereafter declared to Congress that where taxpayers had acted in reliance on such rulings issued to other taxpayers but publicized, such taxpayers were being allowed a net out-of-pocket loss.

[23] Since the Court of Claims concluded that Petitioners were not entitled to a claimed loss under Section 212 (2) because of an absence of profit-making motive, this portion of Petitioners' reasons for granting certiorari apply to that ruling as well, although the references in the text are limited to the Court of Claims' ruling on the Section 165 (c)(2) loss issue.

[24] Weir v. Commissioner, 109 F. 2d 996, 997 (C.A. 3, 1940), cert. denied 310 U.S. 367 (1940), is the leading case.

[25] R. 304.

long established decisions which have held that the profit making motive and intention of the taxpayer is a matter of subjective intent, and such test will have a far-reaching impact on a host of pending tax cases should it not be reviewed.

At the same time the Court of Claims fashioned and applied another rule of law which is also wrong and constitutes a serious misreading of *Gregory* v. *Helvering*, 293 U.S. 465. That new rule is: "there can be no deductible loss allowed under section 165(c)(2) if the transaction which gave rise to the loss has been determined to have been 'without economic substance' or a 'sham'." (R. 306). The new rule was based on the following reasoning:

> ". . . The doctrine of *Gregory* v. *Helvering*. 293 U.S. 465 (1935) requires that:
>
> > * * * in construing words of a tax statute *which describe commercial* or *industrial* transactions, we are to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered into for no other motive but to escape taxation.
>
> Therefore, the statutory word 'profit' cannot embrace profit seeking activity in which the only economic gain derived therefrom results from a tax reduction. In other words, there can be no deductible loss allowed under section 165(c)(2) if the transaction which gave rise to the loss has been determined to have been 'without economic substance' or a 'sham'." (Emphasis supplied)

However, the Court of Claims has offered no explanation in its opinion as to how or why a doctrine adopted and used "in construing words of a tax statute *which*

describe commercial or *industrial* transactions" is or should be relevant or applicable to a subsection of the Internal Revenue Code which deals *exclusively* with *non-trade* or *non-business* losses, that is, losses which result from transactions which are neither commercial nor industrial transactions.[26] Should this new rule not be reviewed, it will have a far-reaching impact on pending tax cases.

The effect of the Court of Claims' decision is punitive in nature, and dictates that taxpayers who have engaged in transactions authorized by Treasury rulings but later classified with the negative label "sham" are to be denied loss deductions which the statute permits. It is more than incongruous that the Treasury Department can be permitted to issue such rulings to persons writing on the letterheads of insurance companies, collect income tax from the insurance companies on the amounts paid to such companies as interest, deny an interest deduction to such taxpayers and collect the full amount of income tax from them as if they had never entered the annuity transactions, and *then* have the Court of Claims approve the Treasury's denial to such taxpayer of a loss resulting from such transaction even though such allowance would never make the taxpayer whole and even though the Commissioner of Internal Revenue had represented to the Congress that he was in fact allowing such losses. There is something seriously wrong and unjust about a series of policies and affirmations thereof by the Court of Claims which allows the Commissioner

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[26] Section 165 (c)(2), Internal Revenue Code of 1954 refers to: "(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business."

of Internal Revenue to "arm" insurance agents with letter rulings which are used to induce taxpayers to enter into such annuity transactions, make a profit from the tax collected from the insurance company's receipt of interest income, and then not honor his word to the Congress that he would undo some of the economic damage to the taxpayers by allowing them a loss for their net out-of-pocket loss. Here the taxpayer has already been punished in the sum of $137,315 as a result of the Commissioner's rulings, and the refund sought herein would only recoup $85,508.92 of that damage which was caused by the Commissioner's rulings.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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